

**SEP 17 2003**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON  
U.S. COURT OF APPEALS**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JIMMY L. GETTINGS,

Defendant - Appellant.

No. 02-10100

D.C. No. CR-00-00535-WBS

MEMORANDUM\*

Appeal from the United States District Court  
for the Eastern District of California  
William B. Shubb, Chief Judge, Presiding

Submitted August 11, 2003\*\*  
San Francisco, California

Before: HALL, O'SCANNLAIN, and LEAVY, Circuit Judges.

Appellant Jimmy Gettings challenges his conviction for assaulting Beverly Wilson, a United States census employee, in violation of 18 U.S.C. § 111(a)(1).

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

\*\* This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Gettings contends that the jury instructions permitted the jury to convict him of simple criminal assault, thereby constructively amending his indictment and also depriving the district court of subject matter jurisdiction. Additionally, Gettings contends that the district court erred by admitting opinion testimony about his character for untruthfulness. We AFFIRM.

A federal grand jury returned an indictment charging Gettings with a violation of 18 U.S.C. § 111(a)(1), an offense that contains two elements: (1) that the defendant assaulted a public employee, and (2) that the public employee was acting within the scope of her official duties at the time of the assault. 18 U.S.C. § 111(a)(1). Jury Instruction 4 clearly instructed the jury that it could not return a guilty verdict unless it found that the prosecution had proved both of these elements beyond a reasonable doubt.

Despite the clear language of Instruction 4, Gettings contends that Instructions 9-13<sup>1</sup> were inconsistent, and that the cumulative effect of the jury instructions led the jury to believe that the prosecution need only prove the elements of simple criminal assault. Gettings's contention has no merit.

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<sup>1</sup>Gettings also objects to Instruction 18, which states that Gettings "is not on trial for any conduct, offense, or activity not charged in the superceding indictment." Gettings, however, does not assign any specific error to Instruction 18, and the instruction appears to have been entirely appropriate.

Instructions 9-11 explain that the government is not required to prove that Gettings was aware of Wilson's status as a federal employee. Rather, the government need only prove that Gettings engaged in conduct towards Wilson that would constitute assault "even if she were not a federal officer or employee." The challenged instructions accurately reflected the substance of the charged offense. See United States v. Feola, 420 U.S. 671, 684 (1975) (holding that § 111 does not require proof that "the assailant be aware that his victim is a federal officer").

Instructions 12-13 outline Gettings's reasonable force defense. A defendant's ignorance of the victim's federal employment status is relevant to the elements of § 111 where "an officer fails to identify himself or his purpose . . . [and the officer's conduct] might reasonably be interpreted as the unlawful use of force directed either at the defendant or his property." Feola, 420 U.S. at 686. "In a situation of that kind, one might be justified in exerting an element of resistance." Id. Accordingly, Instruction 12 directed the jury to acquit Gettings if it found (1) that Gettings was unaware that Wilson was a census worker, and (2) that Gettings used only the amount of force against Wilson reasonably necessary to remove her from his property.

Gettings contends that Instruction 13 rendered Instruction 12 ineffective. Instruction 13 states that a census worker "has the right to enter private land for

the purpose of collecting statistics with respect to the census, and is not a trespasser when she does so.” We discern no error. Read together, Instructions 12 and 13 clarify to the jury that Gettings was privileged to use reasonable force to eject Wilson from his premises if, and only if, he was unaware that she was a federal census employee.

The challenged jury instructions accurately set forth all elements of both the charged offense and Gettings’s affirmative defense. Gettings’s contention that the instructions permitted the jury to convict him based on a theory of simple criminal assault is not supported by the record. Similarly, we reject Gettings’s contention that the jury instructions deprived the district court of subject matter jurisdiction. The jury instructions clearly described the elements of a violation of 18 U.S.C. § 111, a federal offense. See 18 U.S.C. § 3231 (“The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.”).

Finally, Gettings assigns error to the district court’s decision to admit opinion testimony from Gettings’s neighbors as to Gettings’s character for untruthfulness. Opinion testimony about a testifying defendant’s character for untruthfulness is generally admissible. See United States v. Pacione, 950 F.2d 1348, 1354 (7th Cir. 1991); United States v. Lollar, 606 F.2d 587, 588 (5th Cir.

1979). Here, the probative value of the testimony was not substantially outweighed by the possibility of unfair prejudice. Gettings's credibility was a key issue at trial because he and Wilson gave quite differing accounts of their encounter. Although Gettings's neighbors did not know Gettings intimately, they had interacted with him on several occasions. Both witnesses told the court that they had developed a specific opinion about Gettings's character as a result of these interactions. The neighbors' perceptions that Gettings was an untruthful person were, therefore, probative of whether Gettings would lie on the stand. Any prejudice to Gettings could likely have been cured on cross-examination. See Lollar, 606 F.2d at 589 (noting that "cross-examination can be expected to expose defects of lack of familiarity . . . or to existence of feelings of personal hostility towards the principal witness").

AFFIRMED.